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Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law

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I. Introduction

There is an ongoing debate as to how to make the law of armed conflict (LOAC) and human rights law (HRsL) interoperable. The International Committee of the Red Cross's (ICRC's) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* has complicated that process.¹ This article seeks to explain why there is a problem and to propose possible solutions. It only deals with the specific issues of targeting and opening fire. It does not address the issue of detention.² Before embarking on that examination, it is first necessary to identify a range of assumptions and assertions on which the analysis will be based. Certain distinctions within LOAC will then be explored, because of their impact on the rules on targeting. The article will then examine how the decision to open fire is analyzed under HRsL. Options available to make LOAC and HRsL interoperable will be considered before finally suggesting a solution.

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II. Assumptions and Assertions

This section identifies certain issues relevant to the discussion that, for reasons of length, it will not be possible to discuss in any detail.

The Applicability of LOAC Does Not Have the Effect of Making HRsL Inapplicable³

There is overwhelming evidence to support this general proposition, including two advisory opinions and one judgment in a contentious case of the International Court of Justice (ICJ).⁴ The ICJ has suggested that, when both bodies of rules are applicable, LOAC is the *lex specialis*.⁵ It is unclear as yet both precisely what this means and also how it is to be operationalized.⁶ While the United States and Israel have argued that the applicability of LOAC displaces that of HRsL, it appears unlikely that they can claim to be “persistent objectors.”⁷

One of the most important implications of the co-applicability of LOAC and HRsL is that bodies charged with monitoring compliance with HRsL would appear to have the competence to assess whether a killing was a breach of HRsL, even if they have to interpret HRsL in the light of LOAC. The bodies in question include not only monitoring mechanisms that owe their authority ultimately to the United Nations Charter, such as the UN Special Procedures mechanisms,⁸ but also monitoring bodies established under treaties. Those likely to have the most impact in practice are treaty bodies, which can receive individual complaints and deliver binding legal judgments—in other words, the three regional human rights courts.⁹ This does not mean that the opinions of other bodies, notably the Human Rights Committee under the International Covenant on Civil and Political Rights, are not important.¹⁰ The jurisdiction of the regional human rights courts may be limited on other grounds, most notably the uncertain scope of the extraterritorial applicability of HRsL.

The Scope of the Extraterritorial Applicability of HRsL

Unlike the first issue, this question is far from settled.¹¹ It appears to be clear that States have to apply their human rights obligations in territory that they occupy, at least in the case of stable or settled occupation.¹² It is also well established that States have to apply their human rights obligations to persons in their physical control, such as detainees.¹³ What is not clear is the extent to which a State’s human rights obligations apply to acts within the control of State agents where the harm to the victim is foreseeable but the victim is not within their physical control. Such a situation arises when the armed forces of State A in State B deliberately fire at X from a distance of eight hundred yards or intentionally strike a building in

State B, knowing that there are a number of civilians inside, even if they do not know their names.¹⁴

This issue, unlike the previous question, arises purely as a matter of HRsL; it has nothing to do with the co-applicability of LOAC. It only arises in the case of those human rights treaty bodies whose competence is limited to alleged victims “within the jurisdiction” of the respondent State.¹⁵ The UN Special Procedures and the Inter-American Commission of Human Rights, in exercising its functions under the Organization of American States Charter, are not subject to such a limitation.¹⁶ To date, this restriction on the scope of jurisdiction has been most significant in the case of the European Court of Human Rights (ECtHRs) and, to a lesser extent, the UN Human Rights Committee. Important cases, arising out of the conflict in, and occupation of, Iraq in and after 2003 and the conflict between Georgia and Russia in 2008, are currently pending before the former body. It may clarify that Court’s currently incoherent caselaw.¹⁷ It requires a rational path to be found between two equally objectionable extremes. It seems self-evident that a State should not be allowed to do extraterritorially what it is prohibited from doing within its own borders.

It is equally obvious that a State should not be found responsible for acts, omissions and situations over which it exercises no control. An important distinction in HRsL, that between positive and negative obligations, might be relevant in this context. By “negative obligations” is meant the obligation to respect a right, usually by not doing something prohibited. The State also has an obligation to protect individuals from the risk of a right being violated. This requires the State to take measures to protect the individual from potential harm at the hands of State agents or third parties. It represents a positive obligation to protect. The nature of certain rights means that the positive obligation can only be fulfilled by the State exercising the type of control it is expected to have in national territory. The delivery of the right to education requires machinery for setting up schools, training teachers, paying teachers and providing various materials. It is self-evident that State A, engaged in a military operation in State B, cannot deliver such a right to the population. The situation would be different if the armed forces were in effective control of part of the State’s territory over a significant period of time and failed to address in any way the educational needs of the population, or if State A’s forces, present in State B with the consent of the State, failed to protect schools from foreseeable attack. This might suggest that the only relevant test is one of situational control. While that is certainly relevant, it is inadequate to address certain situations when the State freely chooses to undertake an act that it could not do lawfully in its own territory. Take the example of State A, which is engaged in a military operation in State B, but which is not in control of the territory in which it is fighting. Its armed

forces deliberately fire on X at a distance of eight hundred yards. They are not in physical control of X. They are, however, in control of the acts of the armed forces whose behavior is decisive in determining whether or not X is killed. The issue concerns a negative obligation, the obligation not to use potentially lethal force except in defined circumstances. The State does not require elaborate machinery in order to deliver the right; its agents simply have to refrain from opening fire.

It should be remembered that, while much of the discussion of the issue concerns the control exercised by the State acting extraterritorially, the treaty language does not require the alleged perpetrator to be within the control of the State. It requires that the victim should be within the jurisdiction of the respondent State. It should also be remembered that the question here is not whether the situation should be analyzed in terms of HRsL or LOAC but whether HRsL is applicable *at all*. If it is not, certain human rights bodies do not have jurisdiction. If they do have jurisdiction, a second and separate question arises. The body then has to determine whether its analysis of HRsL has to be undertaken in the light of LOAC. That might mean that there was a violation of HRsL only if there were a violation of LOAC. In effect, but not in form, the human rights body would then be enforcing LOAC. It could only do so, however, if it had jurisdiction.

This article will not discuss the issue further but it must be borne in mind throughout the subsequent discussion. It has significant implications for the extent of the problem of co-applicability.

The Geographical Scope of the Applicability of LOAC

Historically, there seems to have been an assumption that LOAC applied throughout the territory of the State involved in the conflict or in whose territory the conflict was occurring.¹⁸ In the case of international armed conflicts (IACs), geographical limitations on the scope of applicability of LOAC may be achieved in other ways. For example, during the Gulf War 1990–91, the coalition forces appear not to have targeted roads and bridges in Iraqi Kurdistan. They were not used to contribute to the Iraqi military effort and their destruction or neutralization would therefore not have delivered a definite military advantage.¹⁹ In IACs, it may be preferable to assume that LOAC applies throughout the relevant territories and to use the definition of a military objective to limit the geographical scope of the fighting on a factual basis.

The situation in the case of non-international armed conflicts (NIACs) is significantly different, whether the State is a party to the conflict or not.²⁰ Although it is important that forces needing the protection of LOAC should get it, it is equally important that a LOAC paradigm should only be used when it is necessary. Emergency measures that are genuinely required are usually accepted, however

reluctantly, by the majority of the population. That population is, however, likely to be alienated by reliance on emergency measures not perceived to be necessary.

On that basis, NIAC rules should apply to those parts of the territory in which fighting is occurring and to conflict-related activities in other parts of the territory. Imagine, for example, that there is a conflict in one province of State A. It introduces internment or administrative detention as an emergency measure. That should not apply to the detention of individuals in other provinces, unless an individual is detained there on account of activities in the province where the conflict is occurring.

The caselaw of the International Criminal Tribunal for the former Yugoslavia (ICTY) suggests support for both the general applicability of LOAC throughout the territory and also a more restricted geographical scope for the applicability of NIAC rules.²¹ A study of State practice, at least with regard to NIACs within the territory of the State, might suggest a more restrictive approach. As a matter of impression, when a conflict is only occurring in part of its territory, a State often only declares a state of emergency in those parts of national territory affected by the conflict.²² That may be principally the product of domestic, notably constitutional-law, concerns or of HRsL, but that would not exclude its possible relevance to the applicability of LOAC.²³

The process of establishing customary law in NIACs is far more complicated than in IACs. In IACs, the whole of the relevant discourse is through the vocabulary of LOAC. That is the principal source of international legal obligations.²⁴ Domestic law is likely to be of limited relevance, particularly to extraterritorial conduct.²⁵ In the case of internal NIACs, the constraints on the conduct of the domestic authorities are principally articulated through domestic law and HRsL.

Confining emergency measures to the parts of the territory where the conflict is occurring and conflict-related activities elsewhere may be the approach currently favored by human rights bodies dealing with derogation during states of emergency.²⁶ Initially, the ECtHRs emphasized that, in order to justify derogating at all, the threat had to be to “the life of the nation” as a whole.²⁷ This might have been thought to imply that the conflict had to be occurring everywhere, thereby justifying the applicability of LOAC everywhere. More recently, the ECtHRs has addressed the situations in Northern Ireland and southeast Turkey.²⁸ At no point was the argument raised that the two States could not derogate because the conflict was only occurring in part of their territories. At the same time, when dealing with cases arising in other parts of the respective States, neither the State itself nor the Court suggested that they should apply the emergency measures in those other areas.

When the applicability of LOAC depends, among other elements, on the level or intensity of the violence, as is the case with Common Article 3 to the Geneva

Conventions of 1949 and Additional Protocol II of 1977, it is already the case that the applicability can vary at different times. That may be relevant when determining whether a geographical limitation to the applicability of NIAC rules is, in principle, acceptable.

In the rest of the article, it will be assumed that NIAC rules only apply to the areas of the territory in which the conflict is occurring and to conflict-related issues elsewhere. In other parts of the territory, domestic law, including relevant human rights obligations of the State, will be applicable.

The Function of Legal Rules in Situations of Armed Conflict

The law does not exist to remove the decision-making authority of the military commander from him. The law determines the bottom line, below which conduct is unlawful. Just because conduct is not unlawful does not make it wise or apt for achieving the military purpose. It is possible that a commander could be prosecuted on this basis, under national military law, for action that did not constitute an international crime.²⁹

The flip side of these propositions is that the law cannot be based on a best-case scenario. In normal circumstances, a decision on opening fire is based on a law and order paradigm.³⁰ That means that it should be taken as a last resort and based on the behavior of the person targeted. It is dependent on the immediacy and severity of the threat that person poses at the time. In most situations of armed conflict, that is inappropriate as a bottom line. It may well be that most of the time and in most of the territory, even during an emergency, a law and order paradigm is appropriate, but in other situations it will not be. Rules are more likely to deliver the desired result if they are suited to the situation in which they are to be applied and for which they have been designed. In other words, just as in peacetime it is in everyone's interest, including that of military forces, to limit decisions on opening fire to a law and order paradigm, in many situations of armed conflict it is in everyone's interest, including that of the civilian population, for such decisions to be based on a LOAC paradigm.

These principles need to inform the operationalization of the relationship between HRsL and LOAC. To assert an unrealistic protection of civilians in situations of armed conflict based on HRsL is not likely to enhance their protection but rather to result in unrealizable expectations on the part of civilians and in increased violation of the rules on the part of the armed forces. If some rules are perceived to be unrealistic, this is likely to lessen respect for those rules that can be applied in practice. This is not to argue that at the first sound of gunfire LOAC should displace HRsL. The circumstances in which an armed conflict paradigm should replace a law and order paradigm will be considered further below. All that is being asserted

here is, first, that there are circumstances in NIACs when LOAC is the more appropriate paradigm and, second, just because the law allows a soldier to open fire does not mean that it is necessarily the right thing to do in a particular situation in which LOAC is applicable.

III. Distinctions within LOAC Relevant to the Rules on Targeting and Opening Fire

Three distinctions need to be considered here: first, that between Hague law and Geneva law; second, that between treaty law and custom; and, third, that between the literal meaning of “direct participation in hostilities” (DPH) and the ICRC’s *Interpretive Guidance*.

Hague Law and Geneva Law

Before 1977 and the adoption of the Additional Protocols to the Geneva Conventions of 1949, particularly Protocol I on international armed conflicts, any discussion took the distinction between Hague law and Geneva law for granted. The rules were usually to be found in different treaties, making the distinction both necessary and relatively straightforward. The usual way of describing the substantive content of the rules was that Hague law dealt with means and methods of fighting and Geneva law with the protection of victims who were, by definition, in the power of the other side. In fact, the rules were even more distinct than this might suggest. Hague law and Geneva law functioned differently as legal subsystems. This was a product of the issues with which each dealt, but it went much deeper than that.

For reasons of brevity, it will be necessary to discuss the differences by way of sweeping generalizations. Even if they may be subject to criticism, that does not mean that there is not an essential truth at their heart. Hague law is directed to the military operator. It guides his decision making at the time. It deals principally with the places where, and times when, fighting is occurring. The rules tend to identify the considerations that must be taken into account and provide guidance as to how they are to be balanced, rather than simply prohibiting a particular outcome.³¹ The rules are a detailed articulation of general principles, such as the principles of distinction, proportionality and military necessity.

Geneva law, on the other hand, is focused on the actual or potential victim, rather than the perpetrator. Many, but by no means all, of the issues that it addresses arise away from the immediate field of battle. The law tends to prohibit certain results or outcomes, usually by requiring certain forms of behavior. The bottom line and the most appropriate behavior in a particular situation are likely to be much closer in the case of Geneva law than Hague law. If Hague law is

principally directed at the individual operator, Geneva law appears to focus more on the obligations of a party to the conflict. Geneva law provides answers or required outcomes, but Hague law provides tools enabling the operator to arrive at an answer in a specific situation. To that extent, Geneva law appears to address *types* of situations, rather than specific ones. The nature of Geneva law may make it easier to mesh with HRsL than is the case with Hague law. If, in the case of Geneva law, it is a question of finding an accommodation between LOAC and HRsL, in the case of a significant portion of Hague law it is a matter of making a choice. That is a product not only of the content of the rules but also of the nature of the separate legal subsystems.

The internal logic of the two subsystems is therefore significantly different, with considerable implications for their functioning as systems. This is reflected in presumptions, qualifications and limitations contained within the rules. If a goal of the Geneva Conventions is the protection of victims, it may mean that qualifications to a rule have the nature of exceptions and suggests that they should be interpreted restrictively. This would reinforce the parallel with HRsL. Hague law has no overarching goal. It seeks rather to establish a balance, one between humanitarian considerations and military necessity. To that end, there can be no default position or presumption in favor of either side of the equation. The rule itself contains the balance. There can be no appeal to military necessity outside the formulation of the rule. Equally, as a matter of law, there can be no appeal to humanitarian concerns outside the rule. There is no need to interpret limitations³² restrictively. They should be given their natural meaning.

Additional Protocol I appeared to merge Hague law and Geneva law. It is not, however, possible to “merge” two sets of rules that function in quite different ways. It might be possible to change each set of rules and to produce an entirely new type of rule, but that was not done. Rather, Protocol I contained some sections and provisions of a Hague-law type and some of a Geneva-law type. Additional Protocol II, which is largely a development of Common Article 3 of the Geneva Conventions of 1949, is principally an example of Geneva law, but it does contain some Hague-type provisions, unlike Common Article 3.

The specific question being explored in this article is targeting and the decision to open fire. Is that a matter of Hague law or Geneva law? While it might be tempting to see civilians at risk from the fighting as an additional class of victim to be protected under Geneva law, it is submitted that that analysis is flawed. The categories of victims protected by the four Geneva Conventions of 1949 share two characteristics. They have been adversely affected by the armed conflict and they are vulnerable because they are in the power of the other side.³³ Their protection does not, by and large, affect the conduct of hostilities, although it will be

necessary to divert resources that could have been used for other purposes to effect their protection.³⁴ Civilians in need of protection from the fighting do not fit within this framework. Their vulnerability arises not from the adversary but from the fact of the fighting. They need protection from their own side as much as from the enemy. Any measures to improve their protection will have a direct impact on the conduct of hostilities. In other words, rules on targeting and opening fire form part of Hague law, even if part of their object is the protection of the civilian population.

The Distinction between Treaty Law and Customary Law in LOAC

Treaty Law

Geneva Law. There is detailed and extensive provision in treaty law for Geneva-law-type issues in IACs. There is fairly detailed provision for such issues in treaties applicable in NIACs, with two significant exceptions—grounds for detention and the status of members of opposing organized armed groups. This is a logical consequence of the situations in question. Domestic law, possibly emergency law, is available to deal with the grounds for detention, at least in the case of internal NIACs. No sovereign State claiming a monopoly on the lawful use of force can logically admit that organized armed opponents have a special status or are acting other than unlawfully. To do so would be to recognize the belligerency, thereby making the conflict effectively subject to the IAC rules. There are some NIAC Geneva-type rules across the very low threshold of Common Article 3 of the Geneva Conventions of 1949. Those basic rules are further developed in situations that cross the significantly higher threshold for the applicability of Additional Protocol II.

Hague Law. The situation is very different in the case of Hague law. Again, there is detailed regulation of the means and methods of fighting in treaties applicable in IACs. There are no treaty rules of a Hague-law type in Common Article 3 NIACs, however, and only very basic provisions in NIACs to which Additional Protocol II is applicable. The one exception is rules on specific conventional weapons, where the recent trend in treaty law is to make the same rules applicable in IACs and NIACs.³⁵ The treaties do not explain whether NIACs refer to all such conflicts or only those that cross the threshold of Additional Protocol II.³⁶

Customary Law

Geneva Law. Assuming that the ICRC's *Customary International Humanitarian Law*³⁷ study, reinforced by the caselaw of the ICTY and International Criminal Tribunal for Rwanda (ICTR) and the Statute of the International Criminal Court in the specific field of criminal rather than civil obligations, offers a fairly accurate guide to customary law rules of a Geneva-law type, there is a close match between treaty provisions and customary law in both IACs and NIACs. Again, it is necessary to exclude rules on grounds for detention and the status of organized armed opponents in the case of NIACs.

Hague Law. The situation is very different in the case of Hague-law rules. There is a significant overlap in treaty and customary law rules of a Hague-law type in IACs but not in NIACs. The caselaw of the ICTY and ICTR and the Statute of the International Criminal Court, together with the customary law study, suggest that there are extensive and detailed customary rules of a Hague-law type in NIACs, even though there are no or only rudimentary treaty provisions. In reaching such conclusions, not one of those sources distinguishes between Common Article 3 NIACs and Additional Protocol II NIACs. This is surprising given that there are no Hague-law-type treaty rules in Common Article 3 NIACs. They only appear in treaty law when a NIAC crosses the very high threshold for the applicability of Additional Protocol II. The most remarkable legal source in this respect is the Statute of the International Criminal Court, the only source based on inter-State negotiation. The negotiators took as their criterion for inclusion in the list of war crimes that the act was regarded as a war crime in customary international law.³⁸ The list in the Statute of Hague-law war crimes in NIACs is much shorter than that in IACs and, most notably, does not include launching an indiscriminate or disproportionate attack. The negotiating States are likely to have been influenced by the customary war crimes in NIACs "discovered" by the ICTY and ICTR. It is nevertheless surprising that in the definition of NIACs in the Statute no distinction is drawn between Common Article 3 and Additional Protocol II situations.³⁹ It would be rash to assume that the Statute of the International Criminal Court is evidence that the distinction no longer matters. The last time that States elaborated general rules for NIACs, they went out of their way to create a threshold of applicability much higher than Common Article 3. Nor should it be assumed that the ICRC's customary law study is not controversial. In fact, that is far from being the case, particularly with regard to Hague-law-type issues.⁴⁰

It is suggested that alleged customary NIAC rules of a Hague-law type that do not bear a close relationship to the NIAC treaty rules should be handled with some

care. The problem is not that such rules risk posing an undue and unwarranted obligation on States;⁴¹ it is rather that the alleged customary rules may imply a shift from a law and order paradigm to an armed conflict paradigm at an inappropriately low level of disruption. Since Geneva-law rules are focused on the protection of victims and bear a significant similarity to the approach of HRsL, their applicability at the Common Article 3 threshold does not appear to be too problematic. It is specifically customary rules of Hague law that give rise to this difficulty. More particularly, it is LOAC rules that *permit* action to be taken, rather than LOAC rules that prohibit attacks against certain types of targets or the use of certain weapons, that cause the problem.

When the alleged applicability of customary Hague rules in a NIAC means that objects indispensable to the civilian population cannot be targeted or that anti-personnel land mines cannot be used, there is clearly no conflict between such a rule and HRsL. The situation is very different if the applicability of customary Hague rules in all NIACs means that an individual can be targeted by virtue of being a member of an organized armed group exercising a continuous combat function—in other words, by reference to status—rather than on account of the threat posed by his behavior.⁴² In low-intensity armed conflicts, the situation is likely to be made worse if armed forces target by reference to status rather than behavior. Mistakes and “collateral casualties” may be even less well tolerated by the civilian population than in high-intensity NIACs. The issue is not whether armed forces can be used to deal with organized armed violence during an emergency, but whether whatever forces are used are applying rules based on a law and order paradigm or an armed conflict paradigm.

Consider the example of “Bloody Sunday.”⁴³ For the sake of argument, let us assume, first, that the events happened today; second, that the situation in (London)Derry is to be characterized as coming within Common Article 3 of the Geneva Conventions;⁴⁴ and, finally, that it is lawful under LOAC rules to open fire against an individual because of his membership in an organized armed group exercising a continuous combat function.⁴⁵ Since the armed forces are unlikely to have membership lists of illegal organized armed groups, a membership test has to be understood as referring to presumed membership. It is not clear how that is to be determined. Can it seriously be suggested that it would be appropriate if international law allowed the British armed forces to open fire against any presumed member of the IRA, irrespective of what he was doing at the time? Would it be sufficient if international law gave them that authority but a commander chose to act within greater restrictions than the law allowed and ordered his forces only to open fire in self-defense?⁴⁶ In other words, should such discretion have been allowed to a military commander or should international law have required him to act within a

law and order paradigm? That is the kind of problem thrown up by the alleged applicability of customary Hague rules in all NIACs, rather than in those of sufficient intensity as to make Additional Protocol II applicable.

The Literal Meaning of “Direct Participation in Hostilities” and the Interpretive Guidance

According to treaty law, at least in the case of IACs, there exist only two possible statuses under LOAC in relation to the law on the conduct of hostilities: combatant and civilian.⁴⁷ The term “combatant” does not describe persons who fight, but persons who are entitled to fight. A combatant has the right to kill and, equally, can be killed by opposing combatants by virtue of having that status.⁴⁸ It does not matter what he is doing at the time he is killed. Only combatants can be targeted by virtue of status alone. The only other people who can be the target of attack are persons who are taking a direct part in hostilities. The status of combatant exists only in IACs. While it is readily understandable that members of an organized armed group are not regarded as combatants, implying as it does an entitlement to fight, this does raise an interesting question about the status of members of the State’s armed forces.⁴⁹ If there is no combatant status in NIACs, are they civilians? Although an individual has no right in international law to participate in a NIAC, he is not committing an international crime by doing so, but obviously he is very likely to be committing a crime under domestic law. Similarly, he will not commit an international crime if he kills a member of the State’s armed forces or a member of another organized group, but he will commit an international crime if he breaches the rules on the conduct of hostilities by intentionally killing a civilian, for example.

The treaty rule that addresses DPH is the same in IACs and NIACs. Civilians enjoy the protection afforded against the effects of hostilities “unless and for such time as they take a direct part in hostilities.”⁵⁰ Whatever the difficulties regarding the time during which a person can be attacked or the conduct that constitutes “taking a direct part,” it is clear that the person has to be doing something that makes him a target of attack. In other words, that depends on behavior and not status. Two different types of problems confront armed forces trying to determine who can be targeted. First, the situations in which armed forces find themselves have evolved significantly since 1977. “A continuous shift of the conduct of hostilities into civilian population centres has led to an increasing intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations.”⁵¹ A more recent phenomenon is the outsourcing of traditionally military functions. This could result in people appearing to be members of the military and to be engaged in hostilities when that is not,

in fact, the case. Alternatively, people could appear to be civilians but also appear to be involved in military activities. In other words, the factual situations in which members of the armed forces find themselves are increasingly confused. This must make it difficult to apply any rule, even if they knew what the rule meant.

The second difficulty concerns the formulation of the rule itself. What is the period of time covered by “unless and for such time as”? When does it start and when does it end? Which activities constitute “participation” and what is the distinction between direct and indirect participation?

It is likely that there is an additional element of frustration and that is with the content of the rule. Imagine that there is significant evidence that X has been and is actively participating in hostilities, but the evidence is not of a quantity, type or character as to enable detention on a criminal charge. The armed forces cannot target X unless they catch him in the act of participating, even though he may be responsible for many deaths.

In these circumstances, it is not surprising that the ICRC sought to clarify the meaning of the rule.⁵² The *Interpretive Guidance* was the product of extensive consultation with experts who were consulted in their personal capacity, but is exclusively the responsibility of the ICRC. Much of the content, particularly in relation to IACs, is relatively uncontroversial. In non-IAC situations, however, that is not the case. In those instances, the *Guidance* is *very* controversial from various and sometimes conflicting standpoints.⁵³ The clarification of the constitutive elements of direct participation and of the beginning and end of direct participation will not be considered further here. What will be examined is the withdrawal of civilian status from members of organized armed groups in NIACs and its implications for the interoperability of LOAC and HRsL.

The *Interpretive Guidance* treats civilians differently in IACs and NIACs. Since an IAC by definition involves at least two States on opposing sides, there is no shortage of “parties” to such a conflict. The *Interpretive Guidance* restates the usual test for combatant status.⁵⁴ All other persons are civilians but they may forfeit protection from attack if they take a direct part in hostilities. In other words, loss of protection depends on the behavior of the individual. The *Interpretive Guidance* clarifies both the meaning of direct participation and also the time during which protection is lost. These clarifications have implications for loss of protection by civilians in IACs, but loss of protection is still dependent on behavior.

The situation with regard to NIACs is very different. A person is no longer to be regarded as a civilian if he is a member of an organized armed group of a party to the conflict. Members of an organized armed group constitute the armed forces of a non-State party to the conflict and consist only of individuals who exercise continuous combat functions.⁵⁵ This clearly means that an individual can be targeted

on account of his status as a presumed member of such a group and not on account of his behavior at the time he is targeted. Given the greater flexibility introduced as a result of the clarification of “unless and for such time as” and “direct participation,” it is not clear why it was thought necessary to address the status of a fighter in a NIAC at all. After all, no change appears to have been introduced to the status of a civilian who takes a direct part in hostilities in an IAC. That possibly represents an oversimplification. In an IAC, civilians who belong to an armed group that does not belong to a party to a conflict can indeed only be targeted if they take a direct part in hostilities. Many such groups will, however, belong to a party to the conflict, even if they do not form part of its regular armed forces. That party, which is by definition a State, will have responsibility in international law for the conduct of those armed forces.⁵⁶ In other cases, the armed group may belong to a party that is not a State but which is involved in an armed conflict against a party to the IAC. The *Interpretive Guidance* suggests that in such a case two armed conflicts will be occurring in parallel; an IAC between two States and a NIAC between the non-State party and one of the States parties. In that case, who can be targeted will be determined by the *Interpretive Guidance* principles applicable in NIACs.⁵⁷ If anything, that reinforces the point that the impact of the *Guidance* proposal only arises in NIACs.

The principal justification suggested for denying civilian status to members of organized armed groups exercising continuous combat functions, while not also granting them combatant status, is the principle of distinction.⁵⁸ There is a need to distinguish between civilians and those who act like the armed forces of a party to the conflict. It is said that Common Article 3 to the Geneva Conventions of 1949 implies that both the State and non-State groups have armed forces.⁵⁹ Less convincingly, it is argued that Additional Protocol II makes a distinction between those who take a direct part in hostilities and the forces that are capable of conducting sustained and concerted military operations.⁶⁰ The *Interpretive Guidance* acknowledges that it is difficult to establish the membership of an organized armed group, in contrast to membership of the armed forces or other official armed group.⁶¹ It is difficult to see how “continuous combat function” can be established other than by conduct, in which case we are driven back to a behavior test. It should be emphasized that loss of status does not depend on membership of a party to the conflict, or even of membership of an armed group belonging to such a party. It is also necessary to establish that the individual exercises a continuous combat function.

Superficially, it might appear that the proposal supports the principle of the equality of belligerents, in that both parties are recognized as having armed forces. In fact, however, the members of an organized armed group exercising continuous

combat functions lose civilian immunity from attack but do not gain the privileges of a combatant.

It could, perhaps with equal plausibility, be argued that the principle of distinction is based on the idea that there are only two statuses in LOAC: that of combatant and that of civilian.⁶² A combatant is someone who has the right to take part in the hostilities and who therefore has the right to kill opposing combatants. Anyone who is not a combatant, therefore anyone who does not have those rights, is a civilian. In that case, members of organized armed groups must be civilians unless the opposing party recognizes their combatant status. Immunity from attack could be lost but only on the basis of the individual's behavior.

The *Interpretive Guidance* just refers to NIACs and does not distinguish between Common Article 3 NIACs and Additional Protocol II NIACs. That is why the "Bloody Sunday" example discussed earlier represents a problem. The *Interpretive Guidance* approach would be easier to defend if it were restricted to situations above the threshold of applicability of Additional Protocol II, at least with regard to the level and nature of the violence.⁶³

At present, there are two principal difficulties for armed forces: the scope of the rule and uncertain facts. Other aspects of the *Interpretive Guidance* address the temporal and functional issues. It is not clear why it was thought necessary to address the question of status before determining the impact of those clarifications. The bigger difficulty is uncertainty about the facts. It is hard to see how the *Guidance* helps there. The ability to target by reference to status depends on the ability to establish that the person targeted was a member of an organized armed group that belonged to a party to the conflict and the person fulfilled a continuous combat function within the group. This is likely to pose a real challenge to armed forces if such a determination is to be based on fact rather than a vague hunch.

Perhaps as a counterweight to the withdrawal of civilian status from certain fighters, the *Interpretive Guidance* emphasizes that, when an individual can be the target of an attack, the kind and degree of force used must "not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."⁶⁴ The *Interpretive Guidance* suggests that, in circumstances when it would not increase the risk to the opposing armed forces or to other civilians, the threat posed by the individual might be neutralized by measures short of the use of lethal force, notably detention.⁶⁵ It is submitted that this represents dangerous category confusion.⁶⁶ Key features of a law and order paradigm are, first, that force is used as a last resort and, second, that priority should be given to an attempt to detain. The essential feature of an armed conflict paradigm, as far as Hague-type rules are concerned, is that there is no obligation to detain. An individual can be targeted by virtue of his status, irrespective of what he is actually doing at the time, or on the basis

of his behavior at the time. As a matter of law, the combination of a right to use deadly force and a requirement to use the minimum force necessary would appear to be incoherent.⁶⁷

It is submitted that there is a better solution, even in purely LOAC terms. It would also have the additional benefit of making easier the operationalization of the relationship between LOAC and HRsL.

IV. A Comparison of the Basis for Opening Fire under HRsL and LOAC

As indicated above, the majority of human rights treaties prohibit arbitrary killings without defining the term. The meaning to be given to “arbitrary” becomes apparent through an examination of the practice of treaty bodies in exercising their monitoring functions and particularly through the caselaw arising out of individual complaints. In this context, it is also relevant to consider the analysis in the report to the UN Human Rights Council of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁶⁸

It is clear from the caselaw that the prohibition on arbitrary killings is applied strictly in the case of deaths resulting from the acts of State agents.⁶⁹ The only basis for opening fire is the behavior of the individual at the time, including the risk posed by the individual to himself or others. It is conceivable that it might, in limited circumstances, be interpreted more broadly. It might be possible to argue that the agent could justify opening fire against an individual on account of the general risk he poses, rather than the risk posed by his behavior at the time.⁷⁰ It would, however, be necessary to establish why, if his behavior is not dangerous at the time, he cannot be detained. The use of potentially lethal force has to be a last resort.

The European Convention for the Protection of Human Rights (ECHR) is unusual in that it defines exhaustively the only circumstances in which resort may be had to potentially lethal force.⁷¹ All those circumstances are based on a law and order paradigm, and are based on the behavior of the individual at the time. Furthermore, the test is not that the use of potentially lethal force is reasonably necessary but that it is absolutely necessary.⁷² In addition, the Convention requires that the State take measures to protect the right to life. This has been interpreted, in the case of planned operations, as requiring security forces to take measures to try to prevent the need to resort to potentially lethal force⁷³ and to protect other civilians in the vicinity from the risk of being injured or killed.⁷⁴ This can result in the State being held responsible for a death that resulted from the use of inappropriate weapons.⁷⁵

All the treaty bodies require both lawful grounds for resorting to potentially lethal force and also that the force used be proportionate. This does not mean

proportionality as it is understood in LOAC but that the force used is proportionate to the risk posed by the individual at the time.⁷⁶

The analysis has so far considered the requirements of HRsL in a “normal” context. The question arises of how the rules are modified, if at all, by the existence of a situation of emergency or armed conflict. All the treaty bodies, other than the ECHR, provide that the prohibition of arbitrary killing is non-derogable. *Prima facie*, this means that it applies also in such situations. It is, however, possible that the meaning of “arbitrary” has sufficient flexibility to apply in a different way in such situations. There appears as yet to be no human rights caselaw involving killings arising out of circumstances in which LOAC indisputably applies a status test—in other words, in IACs. There are relevant cases currently pending before the ECtHRs. There is, however, caselaw arising out of situations in which the *Interpretive Guidance* would suggest that targeting by reference to status is legitimate—in other words, the targeting, in every type of NIAC, of a member of an organized armed group exercising a continuous combat function. The author is not aware of any such situation where the State invoked LOAC or the State claimed such a basis for opening fire. On the contrary, States have argued, successfully or otherwise, that the behavior of those targeted justified the resort to potentially lethal force and/or that the force used was proportionate.

The ECHR is again different in that it provides, “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war . . . shall be made under this provision.”⁷⁷ This either represents a possible derogation or a defense. No State has ever invoked the article, even where the alleged violation of Article 2 occurred during the course of an armed conflict to which Common Article 3 of the Geneva Conventions was arguably applicable.

It is submitted that human rights bodies appear to be wedded to a behavior test. Even assuming that they wish to give effect to the directions of the ICJ that, when both LOAC and HRsL are applicable, they should apply LOAC as the *lex specialis*, they are likely to be reluctant to go back on existing caselaw, either in NIACs generally or specifically in the case of NIACs between the threshold of Common Article 3 and that of Additional Protocol II.

The basis of targeting in LOAC will be set out baldly here, since it has already been the subject of discussion. In IACs, there appears to be a close relationship between the rules of treaty law and customary law. Under both, the following may be targeted by virtue of their status as combatants: members of the armed forces of a party to the IAC, members of a militia belonging to that party and members of a *levée en masse*. Others may only be targeted if they take a direct part in hostilities, either as interpreted on the basis of treaty law or as interpreted in the light of the *Interpretive Guidance*.

In the case of NIACs, there is a marked difference between treaty law and what some allege to be customary law. Under treaty law, there is no guidance as to who may be targeted and on what basis under Common Article 3 of the Geneva Conventions. That presumably falls to be regulated by domestic law and HRsL. Where a NIAC crosses the much higher threshold necessary to make Additional Protocol II applicable, a person may only be targeted for taking a DPH. A person cannot be targeted by virtue of his status.

An analysis of the position under customary law requires a distinction to be drawn between customary law without the *Interpretive Guidance* and customary law taking it into account. The expansive view, based on the *Customary International Humanitarian Law* study, the caselaw of the ICTY and ICTR, and the provisions of the Statute of the International Criminal Court, suggests that in *all* NIACs a person can be targeted only if he takes a direct part in hostilities. This is not the same as the human rights test based on the threat posed by the behavior of the individual at the time, but it is at least based on behavior. It might be possible for human rights bodies to accommodate themselves to that slight widening of the concept of threat, particularly those bodies applying a prohibition of “arbitrary killings.” The picture changes if we take account of the *Interpretive Guidance*. On that basis, a person may be targeted in *all* NIACs either on account of his taking a direct part in hostilities or because he is a member of an organized armed group belonging to a party to the conflict and exercising a continuous combat function. That last element involves targeting on the basis of status and doing so in a situation in which human rights bodies have hitherto applied, without apparent controversy, a behavior test. That is likely to complicate rather than to facilitate the operationalization of the relationship between LOAC and HRsL.

V. Conclusion

A human rights body, trying to give effect to the principle articulated by the ICJ, has to decide first whether LOAC is applicable.⁷⁸ It then has to decide what LOAC says. In order to identify the relevant LOAC rule, it has to characterize the armed conflict as an IAC or a NIAC. If it is an IAC, the possible distinction between treaty LOAC and customary LOAC is unlikely to be of major importance. That is not the case in relation to NIACs. The human rights body needs to know whether it should only apply treaty law, in which case there is a significant difference between situations within Common Article 3 of the Geneva Conventions and those in which Additional Protocol II is applicable. On the other hand, if they are to apply both treaty and customary law, they have the unenviable task of determining the content of customary NIAC rules. The arguments as to the content of customary NIAC rules

are not for academics in ivory towers, dancing on the head of a pin; they have considerable practical importance.

It is submitted that human rights bodies are likely to see themselves as having four options:

- (1) They could regard LOAC as silent with regard to the basis for targeting in low-intensity armed conflicts, therefore applying their usual test under human rights law and limiting the application of DPH to conflicts in which Additional Protocol II was applicable.⁷⁹ This would still involve the application of a behavior test, but a slightly different one from the peacetime test.
- (2) They could apply DPH as the basis for targeting in all NIACs. This would still involve the application of a behavior test, but again a slightly different one from the peacetime test.
- (3) They could regard LOAC as silent with regard to the basis for targeting in low-intensity armed conflicts, therefore applying their usual test, but in this instance applying both DPH and a status test (member of an organized armed group exercising a continuous combat function) in situations in which Additional Protocol II was applicable.
- (4) They could use DPH as the basis for targeting in low-intensity armed conflicts and apply both DPH and a status test in situations in which Additional Protocol II was applicable.

The one thing that human rights bodies are unlikely to accept is the application of a status test in low-intensity armed conflicts.⁸⁰ That is, however, precisely what the *Interpretive Guidance* proposes with regard to members of organized armed groups exercising continuous combat functions. The *Interpretive Guidance* has therefore complicated, rather than made easier, the relationship between LOAC and HRsL. The *Interpretive Guidance* makes it clear that it is only addressing LOAC and not other bodies of rules.⁸¹ That is unhelpful since the majority of States have obligations under both LOAC and HRsL. There would appear to be little point in suggesting that States can target by reference to status in all NIACs if HRsL precludes that possibility, at least in the case of low-intensity armed conflicts.⁸² The only situation in which such a LOAC rule would conceivably be relevant would be a transnational NIAC, if and only if HRsL was not applicable extraterritorially in the particular circumstances.⁸³ The *Interpretive Guidance* should either have confined

targeting by status to situations in which Additional Protocol II was applicable or not used targeting by status at all.

Notes

1. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf [hereinafter INTERPRETIVE GUIDANCE].

2. Detention in transnational non-international armed conflicts (NIACs) has posed real problems of interoperability between LOAC and HRsL in Iraq and even more in Afghanistan. In large part, this is because domestic law is unlikely to address extraterritorial detention. In internal NIACs, the matter will be regulated by domestic law and HRsL. The Copenhagen Process has sought to address the issue. Thomas Winkler, Acting Legal Advisor, Danish Ministry of Foreign Affairs, Address at the 31st Round Table on Current Issues of Humanitarian Law (Sept. 5, 2008), <http://en.calameo.com/read/00000837926fb084b36c9>. *See generally* Christopher Greenwood, Report, International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces ¶ 13 (2007), [http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20\(14%20Aug%2007\).pdf](http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20(14%20Aug%2007).pdf).

3. *See generally* Françoise J. Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?*, in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 485, 489–98 & nn.22–84 (Michael Schmitt ed., 2009) (Vol. 85, US Naval War College International Law Studies).

4. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 5 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106–13 (July 9) [hereinafter Wall Advisory Opinion]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19) [hereinafter Armed Activities].

5. In the cases cited in note 4 *supra*, the ICJ refers to LOAC as international humanitarian law (IHL).

6. *See generally* Nancie Prud'homme, *Lex specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISRAEL LAW REVIEW 355 (2007); Françoise Hampson, *Other areas of customary law in relation to the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 68 (Elizabeth Wilmshurst & Susan Breau eds., 2007) [hereinafter PERSPECTIVES ON THE ICRC STUDY].

7. Hampson, *supra* note 6, at 68–72.

8. “Special Procedures” is the general name given to the mechanisms established by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. Most of the UN Special Procedures obtain their mandates from the Human Rights Council, previously the UN Commission on Human Rights, which are then endorsed by the General Assembly. Most of the mandates address a specific issue, such as torture or extrajudicial, summary or arbitrary executions, but some deal with the human rights situation generally in a particular State. The mandates extend to all UN member States. Unlike a treaty, there is no requirement of express acceptance by a State. *See generally* Office of the United Nations High Commissioner for Human Rights, Special Procedures of the Human Rights Council, <http://www2.ohchr.org/english/bodies/chr/special/index.htm>. For an example of a relevant recent report, see Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28,

2010) (by Philip Alston), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter Alston Report].

9. The European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; the Inter-American Court of Human Rights under the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; the African Court on Human and Peoples' Rights under the African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 INTERNATIONAL LEGAL MATERIALS 58 (1982).

10. The Human Rights Committee can address individual complaints under the first Optional Protocol, Dec. 16, 1966, 999 U.N.T.S. 302 to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], but under Article 5.4 of the Optional Protocol it adopts "views," rather than a binding legal judgment.

11. Hampson, *supra* note 3, at 498–502; Françoise J. Hampson, *The Scope of the Extra-Territorial Applicability of International Human Rights Law*, in THE DELIVERY OF HUMAN RIGHTS: ESSAYS IN HONOUR OF PROFESSOR SIR NIGEL RODLEY 157 (Geoff Gilbert, Françoise Hampson & Clara Sandoval eds., 2010); EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119 (2005); Michael J. Dennis & Andre M. Surena, *Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap between Legal Theory and State Practice*, 13 EUROPEAN HUMAN RIGHTS LAW REVIEW 714 (2008); Nigel Rodley, *The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena*, 14 EUROPEAN HUMAN RIGHTS LAW REVIEW 628 (2009). See generally NOAM LUBELL, EXTRA-TERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010).

12. Wall Advisory Opinion, *supra* note 4, ¶ 112; Armed Activities, *supra* note 4, ¶ 216; U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216.

13. U.N. Human Rights Committee, Communication No. 52/1979 *López Burgos v. Uruguay*, Views of the Human Rights Committee, U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981); *Ocalan v. Turkey*, App. No. 46221/99 (Eur. Ct. H.R. May 12, 2005) (Grand Chamber).

14. *Bankovic and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333, *reprinted in* 123 INTERNATIONAL LAW REPORTS 94 (2001).

15. ICCPR, *supra* note 10, art. 2.1 ("Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction"); ECHR, *supra* note 9, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction"); ACHR, *supra* note 9, art. 1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"). There is no jurisdictional clause in the African Charter, *supra* note 9.

16. This does not mean that extraterritoriality will be of no significance to such bodies, since it may have an impact in relation to State responsibility for positive obligations outside national territory.

17. The English courts are required, under the Human Rights Act 2000, to take account of the caselaw of the ECtHRs. In *The Queen on the Application of "B" & Others v. Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA (Civ) 1344 [59] (unreported, Oct. 18, 2004), a case that concerned the actions of consular officials in Australia, the Court of Appeal had

difficulty in reconciling the decisions of the ECtHRs in *Bankovic*, *supra* note 14, and *Ocalan*, *supra* note 13. In *Al-Skeini & Others v. Secretary of State for Defence* [2004] EWHC (Admin) 2911 [222], the High Court had difficulty in reconciling the decisions of the ECtHRs in *Bankovic* and *Issa & Others v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., Chamber, Admissibility Decision (May 30, 2000); *Issa and Others v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. Rep. 567 (2004).

18. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 68–70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 635–36 (Sept. 2, 1998).

19. The destruction, capture or neutralization of an object has to offer a definite military advantage in order for the thing to be a military objective as defined in Article 52.2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Had the roads and bridges been so used, they would have become military objectives. In other words, the advantage of using the definition of “military objective” to determine the geographical scope of applicability of LOAC is that it depends on the facts and the conduct of the parties, rather than a potentially arbitrary geographical yardstick.

20. The treaty rules appear to have been designed for situations of internal NIAC, that is to say, an armed conflict within a State either between that State and one or more organized armed groups or between such groups themselves within the territory of a State. The treaty language means that Common Article 3 of the Geneva Conventions of 1949 is capable of applying to an armed conflict in State B between State A and an organized armed group based in and fighting from State B. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Additional Protocol II of 1977 cannot be applicable in such a situation since it requires the State party to an armed conflict to be the same State as the one in whose territory the conflict is fought. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

21. “Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited.” Tadic, *supra*, note 18, ¶ 68.

22. E.g., the United Kingdom in relation to Northern Ireland and Turkey in relation to the situation in southeast Turkey in the late 1980s and early 1990s.

23. This raises the question of how to establish customary law in NIACs. Are domestic judicial decisions that may not be based on LOAC but purely on domestic law relevant as a source? When trying to establish custom, is it appropriate to look at a situation in which LOAC appears to be applicable and then to examine any evidence of the existence of rules, whatever their source or nature, or is the only relevant information evidence of international rules of a LOAC type thought to be applicable? See I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxv–xlv (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) & *infra* note 40.

24. With the possible addition of HRsL and other areas of international law insofar as they are unaffected by the existence of the armed conflict, see the ongoing work of the International Law Commission on the Effects of Armed Conflicts on Treaties, http://untreaty.un.org/ilc/guide/1_10.htm (last visited Jan. 17, 2011).

25. It is likely to be more relevant to measures taken domestically on account of the IAC, e.g., evacuation or detention of enemy aliens.

26. The ECHR, *supra* note 9, art. 15; ACHR, *supra* note 9, art. 27, and ICCPR, *supra* note 10, art. 4, expressly envisage the possibility that there may be an emergency within a State of such a character as to require the State to take exceptional measures and to prevent it from applying ordinary measures in the usual way. The treaties provide that, in such a situation, the State may modify the scope of certain of its human rights obligations, subject to procedural requirements with regard to notification. The process is known as derogation. Certain rights are non-derogable (e.g., the prohibition of arbitrary killings under the ICCPR and the ACHR, and of torture under all three treaties; see further *infra*). Even potentially derogable rights may have a non-derogable core. For example, a derogation to the usual requirements with regard to detention may justify a longer than usual period before a detainee is brought before a judicial officer or administrative detention but it will never justify enforced disappearances. See generally U.N. Human Rights Committee, *General Comment No. 29*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 on Art. 4 ICCPR, ¶ 16 (2001); Hampson, *supra* note 3, 492–94.

27. *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) ¶¶ 28–29 (1961).

28. *Brogan & Others v. United Kingdom*, App. Nos. 11209/84, 11234/84, 11266/84 & 11386/85, 11 Eur. H.R. Rep. 117 (1988) (Eur. Ct. H.R.); *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89 & 14554/89, 258 Eur. Ct. H.R. (ser. A) 29 (1993); *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260.

29. For example, if in an IAC a commander gave the order that armed forces could only open fire in self-defense and a member of the armed forces deliberately killed a combatant who did not pose a threat to him, the soldier has not acted in violation of LOAC but could be punished for disobeying a lawful order.

30. That is usually the case under domestic law. Under most HRsL, the test is whether a killing is arbitrary. What is arbitrary in peacetime is not the same as that which is arbitrary in time of conflict. The caselaw of human rights bodies suggests that peacetime killings are analyzed in terms of a law and order paradigm. Article 2 of the ECHR is different and unique in that it sets out the only grounds on which a State may resort to the use of potentially lethal force. Those grounds are based on a law and order paradigm. See further note 71 *infra* and accompanying text.

31. An obvious exception is the absolute prohibition of intentional attacks against civilians and the civilian population. The distinction between Hague-law prohibitions and Hague-law permissions will be considered further below.

32. E.g., “for reasons of imperative military necessity” and “unless circumstances do not permit.”

33. An exception is Geneva Convention IV, *supra* note 20, Part 2, which addresses the “general protection of populations against certain consequences of war.”

34. E.g., evacuating and caring for the wounded and sick, and using members of the armed forces to run prisoner of war camps.

35. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, *reprinted in* 19 INTERNATIONAL LEGAL MATERIALS 1523 (1980). Amended Article 1 made the Convention as a whole and therefore all its protocols applicable in both IACs and NIACs. Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Doc. No. CCW/CONF/II/2 (Dec. 21, 2001). A subsequent Protocol on Explosive Remnants of War (Protocol V), Nov. 27, 2003, U.N. Doc. CCW/MSP/2003/2, was therefore applicable in both IACs and NIACs from the start. That change had already

been made with regard to the Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, U.N. Doc. CCW/CONF.I/7 (Oct. 12, 1995) as a result of the 2001 amendment and the Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), May 3, 1996, S. Treaty Doc. No. 105-1 (1997) was applicable in both IACs and NIACs from the start as a result of Article 1.2 of the Protocol.

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211, *reprinted in* 36 INTERNATIONAL LEGAL MATERIALS 1507 (1997) and the Convention on Cluster Munitions, Dec. 3, 2008, 48 INTERNATIONAL LEGAL MATERIALS 357 (2008) prohibit the use of the weapons defined in those treaties in all circumstances, therefore in both IACs and NIACs.

The significance of the distinction between Hague-law prohibitions and Hague-law permissive rules will be considered further.

36. There is a real difficulty in making the weapons rules applicable in both situations, but it is not attributable to the distinction between prohibitions and permissions in Hague law, rather to the paradigm confusion between law and order/law enforcement and an armed conflict paradigm. Certain weapons that are traditionally used and have an important role to play in law enforcement are prohibited in IACs, most notably expanding bullets and riot control agents, such as tear gas. The increasing complexity of modern conflict, sometimes characterized as “three-block warfare,” results in different rules being applicable in different situations at the same time. The difficulties to which that gives rise in practice are likely to be exacerbated if the clear distinction between what is permitted and prohibited in different situations and paradigms becomes blurred. An example of such confusion is Resolution RC/Res.5 adopted at the Review Conference of the Rome Statute on June 8, 2010, which adds to the list of war crimes in NIACs “(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.” Resolutions and Declarations adopted by the Review Conference, http://212.159.242.181/iccdocs/asp_docs/ASP9/OR/RC-11-Part.II-ENG.pdf (last visited Jan. 17, 2011).

The difficulties would be reduced if the changes were confined to situations in which Additional Protocol II is applicable, since an armed conflict paradigm is more clearly applicable in such situations than those in which the level of violence comes within Common Article 3 but not Additional Protocol II. It should be noted that, in some circumstances, Additional Protocol II will not be applicable for a different reason. If State A is engaged in an armed conflict in State B against a non-State armed group based in State B, Additional Protocol II is not applicable since the State in whose territory the conflict is being fought is not a State party to the conflict. Nevertheless, the level of violence and the degree of organization and control of the non-State actor might be sufficient to satisfy the high threshold of Additional Protocol II were it not for this barrier to its applicability.

37. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 23.

38. Knut Dörmann, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, in 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 345 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2003). The one exception was anything addressing the recruitment or use of child soldiers, which was an example of progressive development. It appears to be universally acceptable as a rule, if not in the observance.

39. Statute of the International Criminal Court art. 8.2(d) & (f), July 17, 1998, 2187 U.N.T.S. 90. Interestingly the definition of “an armed conflict not of an international character” differs slightly as between the list of criminalized violations of Common Article 3 and other criminalized violations. In the case of the former, the list of crimes “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other

acts of a similar nature.” This reflects Article 1.2 of Additional Protocol II of 1977. In the case of war crimes in NIACs not based on Common Article 3, the definition in Article 8.2(f) starts in the same way but continues, “It [paragraph 2(e)] applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” The reference to “protracted” is not to be found in Common Article 3 itself but is one of the elements thought necessary to constitute an armed conflict by the ICTY, as reflected by the judgment in the *Tadic* case, *supra* note 18. It is not clear whether this is simply intended to serve as a definition of a Common Article 3 NIAC (in which case why was the same text not included in subparagraph d?) or whether it is intended to create a new threshold in the case of war crimes not based on Common Article 3. If the threshold is different, it would explain why it is not used in subparagraph d. It is not clear whether the threshold is higher or merely different.

40. John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007). See generally PERSPECTIVES ON THE ICRC STUDY, *supra* note 6. The study has been challenged on a variety of grounds. Some have questioned the nature of some of the materials used as evidence of State practice. Others have questioned the sufficiency of the evidence used to establish the existence of a rule. Yet others accept the manner in which a rule is formulated but challenge the accuracy of the commentary.

41. While the focus in this text is on the responsibilities of States, since only States (and arguably quasi-State entities) have legal obligations under HRsL, it should not be forgotten that the applicability of customary LOAC rules of a Hague-law type across the threshold merely of Common Article 3 would have implications for non-State organized armed groups.

42. INTERPRETIVE GUIDANCE, *supra* note 1. See further discussion *infra* pp. 198–202, The Literal Meaning of “Direct Participation” in Hostilities and the *Interpretive Guidance*.

43. See REPORT OF THE BLOODY SUNDAY INQUIRY (2010), available at <http://report.bloody-sunday-inquiry.org/>. The author has chosen to call the city of Northern Ireland where the events of Bloody Sunday occurred, known as both Derry and Londonderry, (London)Derry, so as to accommodate both the Catholic/Nationalist and Protestant/Unionist views of the name.

44. The Foreign and Commonwealth Office of the United Kingdom denied that the situation in Northern Ireland ever crossed the threshold of Common Article 3. Many members of the Army Legal Services appear to be of the view that at certain times and in certain places the situation did cross that threshold.

45. Proposed as the test in all NIACs in the *Interpretive Guidance*. See INTERPRETIVE GUIDANCE, *supra* note 1, at 36.

46. At the time, as a matter of domestic law, the armed forces only had the same authority as a policeman to open fire and that was based on a law and order paradigm.

47. The term “combatant” is used in Additional Protocol I (e.g., Articles 43 and 44) and replaces the use of “belligerent” in Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Regulations]. Article 50 of Additional Protocol I effectively defines civilians as persons who are not combatants. The terms are therefore mutually exclusive and no one can fall in between the two. Combatants include not only members of the regular armed forces, but also members of a militia who satisfy the requirements of Article 43 of Additional Protocol I or Article 1 of the Hague Regulations, *supra*, and members of a *levée en masse* under Article 2 of the same treaty.

48. Additional Protocol I, *supra* note 19, art. 43.2. A combatant cannot be prosecuted for the fact of fighting or for killing opposing combatants.

49. INTERPRETIVE GUIDANCE, *supra* note 1, at 27.
50. Additional Protocol I, *supra* note 20, art. 51.3; Additional Protocol II, *supra* note 19, art. 13.3.
51. INTERPRETIVE GUIDANCE, *supra* note 1, at 11.
52. The *Interpretive Guidance* is clear that it is not intended to and does not effect any change in the law. See, e.g., *id.* at 19.
53. For detailed scrutiny of the *Interpretive Guidance*, see Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 637 (2010). The whole issue is devoted to the *Guidance*. This article criticizes it from a standpoint not addressed in other writings, which tend to focus on an exclusively LOAC perspective.
54. See *supra* note 47.
55. INTERPRETIVE GUIDANCE, *supra* note 1, at 27.
56. *Id.* at 23.
57. *Id.* at 24.
58. *Id.* at 27–28.
59. *Id.* at 28.
60. *Id.* at 29.
61. *Id.* at 32–33.
62. Article 50.1 of Additional Protocol I, in effect, defines a civilian as any person who is not a combatant.
63. See comment in *supra* note 36 on the circumstances in which only Common Article 3 will be applicable, notwithstanding the existence of a level and nature of violence as to satisfy the threshold of Additional Protocol II.
64. INTERPRETIVE GUIDANCE, *supra* note 1, at 82.
65. *Id.* at 81.
66. See generally W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 769, 801–2 (2010).
67. In certain circumstances, it may make operational sense to say that armed forces are free to target by reference to status but, if an opportunity arises to detain, they should do so, whether in the hope of obtaining intelligence or to assist in the “battle for hearts and minds.” That is not the same as combining the two elements. The default position is the targeting test. Detention is merely an alternative option. See also Parks, *id.* at 809.
68. Alston Report, *supra* note 8. Since the mandate of Professor Alston, the Special Rapporteur preparing the report, contains no requirement that the victim be within the jurisdiction of the State, his comments on the extraterritorial applicability of the obligation to protect the right to life are not of direct assistance in determining the scope of applicability in the case of treaties containing such a requirement. There is no reason to have any such reservation in relation to the meaning to be ascribed to “arbitrary.” The mandate is generally interpreted as covering similar ground to Article 3 of the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), and Article 6 of the ICCPR, *supra* note 10. In other words, it is not limited to executions but extends to killings generally. See Office of the United Nations High Commissioner for Human Rights, *International Standards*, <http://www2.ohchr.org/english/issues/executions/standards.htm> (last visited Jan. 17, 2011).
69. See, e.g., *Husband of Maria Fanny Suarez de Guerrero v. Colombia*, Human Rights Comm., 37th Sess., No. R.11/45, P 12.2, U.N. Doc. Supp. No. 40 (A/37/40) (1982); *McCann v. United Kingdom*, App. No. 18984/91, 324 Eur. Ct. H.R. (ser. A) ¶¶ 147–50 (1995).

Those concerned with the relationship between LOAC and HRsL in the context of targeted killings have paid considerable attention to “the targeted killings case.” Public Committee against Torture in Israel v. Government of Israel, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

It should be noted that the Israeli court went out of its way to stress the very particular context in which the case arose, that is, occupied territory adjacent to the territory of the occupying power. See generally William J. Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 332–38 (2007).

70. Potentially, that could include behavior which constituted direct participation in hostilities but which did not represent a threat to others at the time.

71. Article 2 of the ECHR provides:

1. Everyone’s right to life shall be protected by law. . . .

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

72. *McCann v. United Kingdom*, *supra* note 69, ¶ 149.

73. *Id.*, ¶¶ 192–94.

74. *Ergi v. Turkey*, App. No. 23818/94, 32 Eur. H.R. Rep. 388 (1998).

75. *Gulec v. Turkey*, 28 Eur. H.R. Rep. 121, ¶ 71 (1998).

76. Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 737, 745–46 (2005).

77. ECHR, *supra* note 9, art. 15.2.

78. Françoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 549 (2008).

79. When the conflict is of the requisite intensity for Additional Protocol II to be applicable, but it is not applicable because the conflict occurs in the territory of a State not a party to the conflict, it should be treated as an Additional Protocol II conflict for these purposes. It is beyond the scope of this article to consider whether Article 1.1 of Additional Protocol II should be amended to replace “its armed forces” by “the armed forces of a High Contracting Party.”

80. See generally David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2005).

81. INTERPRETIVE GUIDANCE, *supra* note 1, at 11.

82. “Low-intensity conflict” is used so as to exclude situations in which only Common Article 3 to the Geneva Conventions is applicable, not on account of the limited intensity of the violence, but because the State in whose territory the conflict is fought is not a party to the conflict. See *supra* notes 36 & 79.

83. The reference here is to a conflict in the territory of State B between the armed forces of State A and a non-State actor in State B. Where State A is assisting State B in an armed conflict against a non-State actor, State A is acting extraterritorially but the conflict is not transnational. If the consent of State B is the basis for the presence of State A, State B may have the obligation, under HRsL, to ensure that any State assisting it should respect State B’s human rights obligations. No issue would arise for State B as to the scope of the extraterritorial applicability of HRsL.